

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

Roberta C. Smith,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Case No. 2:08-cv-0380
	:	
Michael J. Astrue,	:	JUDGE FROST
Commissioner of Social	:	
Security,	:	
	:	
Defendant.	:	

REPORT AND RECOMMENDATION

On July 11, 2008, the Commissioner moved to dismiss this case. The motion was supported by an affidavit stating that the final decision from which plaintiff appeals was issued on January 14, 2008. It was presumed to be received by plaintiff five days later. Under 42 U.S.C. §405(g), plaintiff was required to file this case within sixty days thereafter, or by March 20, 2008. She did not submit her application to proceed *in forma pauperis* until April 22, 2008. As a result, the Commissioner argues that the case must be dismissed as untimely.

The Court's Local Civil Rules (Rule 7.2(a)(2)) state that any memorandum in opposition to a motion must be filed within twenty-one days after the motion is filed. That time has now passed. Plaintiff has not responded to the motion to dismiss. As a result, the record on the question of whether this case was timely filed consists solely of the affidavit submitted by the Commissioner. That affidavit shows that the case was filed more than thirty days after the filing deadline. Because this deadline is not jurisdictional, it can be extended under certain circumstances. Cook v. Commissioner of Social Security, 480 F.3d

432 (6th Cir. 2007). No such circumstances are pleaded in the complaint, however, and because plaintiff has not responded to the motion to dismiss, none appear in the record. Consequently, it is recommended that this action be dismissed as untimely filed.

PROCEDURE ON OBJECTIONS

If any party objects to this Report and Recommendation, that party may, within ten (10) days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate judge with instructions. 28 U.S.C. Section 636(b)(1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to have the district judge review the Report and Recommendation de novo, and also operates as a waiver of the right to appeal the decision of the District Court adopting the Report and Recommendation. See Thomas v. Arn, 474 U.S. 140 (1985); United States v. Walters, 638 F.2d 947 (6th Cir.1981).

/s/ Terence P. Kemp  
United States Magistrate Judge